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DEFENSE EXPERT WITNESSES IN MEDICAL NEGLIGENCE LITIGATION:

*Finding, Retaining, and Preparing Them – Best Pre-Trial Practices for
Favorable Settlement or Trial Success*

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I. EXPERT WITNESSES IN MEDICAL NEGLIGENCE CASES – A PRACTICAL GUIDE.

The greatest impediment to securing the best expert(s) for your case is neither a dearth of experts nor the tools to locate them. The number one impediment is time or, rather, the limited time busy lawyers and their staff can spend finding and retaining experts. This article is intended as a guide to assist busy lawyers and their busy staff.

Arguably, the first two questions one should ask herself is, for what trial issue(s) do I need an expert and what kind of expert(s) do I need?

- Liability – Standard of care experts in your client’s area of practice.
- Causation – medical, engineering, medical device monitoring, pharmacologic, etc.
- Damages – medical, vocational rehab, life care, accounting, economist, life expectancy, etc.
- If your jurisdiction allows non-parties to the suit to be allocated a percentage of fault, don’t forget the expert(s) needed to prove that non-parties’ fault.

Early research regarding the criteria for admitting the opinions of the expert you are seeking to obtain is essential if the type of expert or the issue for which expert testimony is needed are novel to you. Often, a simple West Law search for “admissibility of expert testimony by (insert the expert’s area of expertise)” will get you where you need to be.

Ask yourself whether a hired expert is needed.

- Can your client provide the expert opinion? Advantages include cost, convenience, and motivation. Disadvantages include claims of bias, probably best reserved for issues that are not central and/or not controversial.
- Hybrid witnesses – treating physicians and other “hybrid” experts.
 - Possible advantages include a presumed lack of bias from pecuniary or other entanglements.
 - Possible disadvantages include confidentiality (treaters) that prevent private conferences and lack of interest, time or experience on expert’s part.
 - Lay “expertise.” Is the issue something that a lay witness can provide an opinion regarding?

An essential question is, will the expert be allowed to present opinions in Court?

When selecting and vetting any expert, the roadblocks to gaining admissibility of an expert’s opinion should be top of mind. This is especially so when you are attempting to identify an expert for an issue or issues for which you have not previously used an expert. The hurdles to getting an expert opinion to the jury/trier of fact include Daubert requirements - or, in some jurisdictions, Frye requirements. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Also, most states have statutory and case law requirements that must be met before a medical expert may give opinions in court regarding the standard of care of a physician or other health provider. Most experienced lawyers practicing in an expert heavy area like medical negligence defense have a

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“walking around” knowledge of these requirements. But it can be helpful to review the law as you are deciding on an expert.

I have set out the Federal Rule codifying Daubert below. To the extent that your state’s judicial gatekeeper standard is substantially different than Rule 702, you will, of course, want to use your state’s standard as you contemplate bringing an expert into your case.

Federal Rule of Evidence 702 (codification of Daubert) - Testimony by expert witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;*
- (b) the testimony is based on sufficient facts or data;*
- (c) the testimony is the product of reliable principles and methods; and*
- (d) the expert has reliably applied the principles and methods to the facts of the case.*

Federal Rule of Evidence 703 – Bases of an Expert’s Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Another consideration when selecting and retaining experts is whether the expert whose retention you are contemplating is truly an expert in the particular field so that the expert will be permitted to testify based upon facts and data generally relied upon in that field even if the underlying facts and data would not otherwise be admissible. Again, it is advisable to have your state’s version of Federal Rule 703 top of mind when bringing on an expert.

Be aware of your jurisdiction’s statutory and case law imposed requirements for expert testimony. Many states have laws that impose special requirements on experts testifying about the medical standard of care. Depending on your jurisdiction, these may include:

- That the testifying expert be of the same specialty, or a specialty similar to that of the Defendant provider.
- That the testifying expert has actively practiced for a specified number of years in the specialty in which expert testimony is offered as a standard of care expert.
- That an out of state testifying expert obtain a limited license from the state medical board of the state in which she is offering standard of care testimony as a precondition to giving standard of care opinions.
- In some jurisdictions, there are special requirements applicable to certain specialties. For

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example, a requirement that a testifying expert has actively practiced in an emergency room within a period of years to be permitted to opine for or against an emergency physician's adherence to the standard of care.

Federal Rule of Evidence 701- Opinion testimony by lay witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness's perception;*
- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and*
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.*

Most jurisdictions have rules and/or case law which, like Federal Rule of Evidence 701, severely restrict non-experts from giving opinion testimony.

Finding the expert/will the expert be persuasive?

- Your list
- Your past experience
- Your team's past experience
- Your firm's past experience
- Your closed files
- The claims professionals with whom you work
- Your lawyer friends
- Your client
- The experts already staffing your case
- Your past experts
- Your current experts in other cases
- The internet
- West Law/Lexis Nexis
- Med School websites
- The literature in the field
- FDLA/DRI/IADC, etc.
- Expert services – TASA, ALM, etc.
- Medical practices whose providers practice in your client's area of specialty

Vetting the expert – begins while you are finding the expert and continues until she takes the stand.

- Get a preliminary impression of the expert's likely opinion from the expert so you do not waste time/money.
- Ask the expert hard questions.
- If a novel expert is needed or a novel issue is involved, research on West Law/Lexis Nexis.
- Define the expert's job.

- If an expert is not right for your case ask that expert whom they would recommend?
- Ask the expert if they have been limited or disqualified?
- Has the expert actually previously worked with/testified on the key issues of the case?
- Does the expert actually have practice experience providing the care/performing the procedure at issue in your case?
- Has the expert written on the subject? Read everything that your prospective expert has written on the pertinent issues. This will help you avoid getting bitten on your backside.
- Will the witness come to court?
- Will the witness cover liability, causation, damages?
- Has the witness testified?
- Who has the witness testified for?
- Ask the expert why she/he is qualified for your case?
- Will the expert provide timely cooperation and assistance?
- Make sure the expert is not “too” expensive.
- Ask about the “baggage” including impeachment baggage.

Impeachment considerations

- Has the witness’ and/or the witnesses’ opinion been excluded by a court?
- Does the witness make so much money testifying for the defense that, assuming this will be admissible, the jury will be “turned off?”
- Is the witness on record in a deposition or trial transcript as giving an opinion diametrically opposed to the opinion you are hoping to get from the witness?

Even when considering an expert with whom you have great familiarity because you/your firm has used the expert many times, it is advisable to pose the questions above to the expert and others. Also, it is advisable to review your/your firms’ use of any particular expert over the years. There may come a time when even a well-qualified, solid testifying witness has been used so much or paid so much by you/your firm that the available bias impeachment tells you it is time to move on.

The eternal question – It is better to have a veteran of the courtroom with the baggage they often bring versus an equally, if not better, qualified neophyte?

I trust that the methodology and checklist set out above will be useful to you.